BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

| | | |
|---|---|---|
| In the Matter of the Appeal by | ) | SPB Case No. 34727 |
| | ) | |
| **SHAPRIA F. CHAPMAN** | ) | **BOARD DECISION** |
| | ) | (Precedential) |
| | ) | |
| From dismissal from the position of Food Service Worker I at Patton State Hospital, Department of Mental Health at Patton | ) | **NO. 95-07** |
| | ) | March 7, 1995 |

Appearances: Therese DaSilva, Staff Attorney, California State Employees Association, on behalf of Appellant, Shapria F. Chapman; Michael M. Johnson, Patton State Hospital, Department of Mental Health on behalf of Respondent, Department of Mental Health.

Before: Lorrie Ward, President; Floss Bos, Vice President; Richard Carpenter, Alice Stoner and Alfred R. Villalobos, Members.

**DECISION**

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) in the appeal of Shapria F. Chapman (appellant) from dismissal on February 25, 1994 from the position of Food Service Worker I with the Department of Mental Health (Department). He was dismissed from his position for refusing to follow the order of a fellow employee working in a supervisorial capacity, cursing at that employee, hitting that employee across the face, and grabbing and pushing two female coworkers who attempted to calm him down, hurting one of the coworker's arms.

In the Proposed Decision rejected by the Board, the ALJ found appellant's testimony, that he struck the employee in the face only

in retaliation for first being grabbed around the throat, not credible. The ALJ concluded that appellant lost his temper and, without provocation, struck a fellow employee. While the ALJ found appellant's actions to be harmful to the public service, he also found the facts of this case to be somewhat analogous to those set forth in the Board's precedential decision Frank G. Bennett (1994) SPB Dec. No. 94-01, wherein the Board modified Bennett's penalty for accosting a fellow employee from dismissal to a 90 days' suspension. The ALJ opined that since the facts in the instant case were more egregious than those in Bennett, a six months' suspension was an appropriate penalty.

The Board rejected the ALJ's decision to determine what the appropriate penalty under the circumstances of this particular case. After reviewing the record, including the transcript, exhibits and written arguments submitted by the parties[1], the Board finds that appellant's dismissal should be sustained.

**FACTUAL SUMMARY**

Appellant went to work for the State of California as a Food Service Worker I on January 31, 1992. He has no prior history of formal adverse action. He has, however, received a number of

[1] As set forth, infra, at page 7, those portions of the Department's written argument concerning the extent of witness Betty Isaac's injuries discovered after the hearing were not considered by the Board in reaching its decision.

Neither party requested oral argument before the Board.

informal admonitions in his few years with the Department, primarily contained in counseling memoranda. These memoranda counselled him, among other things, to follow proper procedures, to act appropriately, to wear proper attire and to record his absences properly.

On January 17, 1994, appellant was assigned to work with Balt Moreno (Moreno), a fellow Food Service Worker, who had been assigned to act as a leadperson in the cafeteria. The testimony of the witnesses to the incident indicated that appellant and Moreno did not generally get along well. On that morning, appellant was about 10 feet away from Moreno, working with another coworker preparing diets for the patients, when Moreno asked for appellant's assistance in unloading a hot cart of food. In a loud voice, appellant refused to help Moreno unload the food cart, saying he was busy with the diets. Moreno made a second request for appellant's assistance, and again appellant loudly refused to assist Moreno, telling Moreno to "do it yourself."

Appellant watched Moreno walk away to where Betty Isaac, another coworker, was standing. Appellant observed what he thought to be Moreno criticizing appellant's refusal to help him with the hot food cart. Appellant, who was carrying a large tub of jelly at that time, became very angry and, carrying the jelly, walked across the room to where Moreno was speaking to Isaac and aggressively yelled at Moreno, "If you have anything to say about me, say it to

my face." Moreno denied that he was talking about appellant. Appellant stood right in front of Moreno, got "in his face," and continued yelling profanity at Moreno while accusing Moreno of speaking badly about him behind his back.

Moreno asked appellant two or three times to "back off" but appellant failed to comply with Moreno's request. Appellant claims that at that point, Moreno grabbed him by the throat, and he, in turn, punched Moreno out of reflex. Moreno, on the other hand, claims he merely used an opened hand and gently pushed against appellant's upper chest region in an effort to get the appellant "out of his face" when the appellant refused to move on his own. Moreno's version of the facts was substantiated by numerous witnesses at the hearing.[2]

According to Moreno's testimony, Moreno gently pushed appellant away from his face, appellant stated something to the effect that "nobody touches me" and struck Moreno with a half-opened fist on the right side of Moreno's face, knocking Moreno's glasses off of his head. As a result of the blow, Moreno received

[2] The ALJ notes in his Proposed Decision that while the majority of witnesses to the incident saw Moreno only place his open hand on appellant's chest in a gentle manner, one witness corroborated appellant's claim that Moreno actually grabbed him by the throat. However, as the ALJ noted in his Proposed Decision, the record reveals that this witness actually demonstrated Moreno's actions by showing her opened hand placed a few inches below the throat in the upper chest region. On this basis, we agree with the ALJ that Moreno's version of the incident is the more credible version.

a fairly serious facial injury and was placed on limited duty at work for sometime thereafter.

Immediately after appellant struck Moreno, Betty Isaac, who had been standing next to the two men during the incident, walked between the two men in an attempt to calm appellant down. Appellant yelled at Isaac to get out of the way and grabbed her by the arm pulling her out of the way, hurting Isaac's arm. A second food service worker then tried to intervene, but again appellant physically stopped her from doing so, raising his arm to push this woman away as well. While appellant made physical contact with this second worker, she sustained no injury.

Appellant does not deny that he twice refused the orders from Moreno to assist him in unloading the hot food cart. He also does not deny striking Moreno or grabbing and pushing away the two woman coworkers who were attempting to stop appellant from striking Moreno. Appellant claims, however, that his striking Moreno was only a natural reflex from being angered by Moreno's loud and nasty comments about him in front of his fellow workers and Moreno's initial physical provocation. Appellant testified that he regrets the incident and would, in the future, follow orders of a leadworker. He also agreed at the hearing that he would refrain from engaging in such verbal and physical confrontations in the future by taking any problems he had directly to a supervisor.

Based upon this incident, the Department dismissed appellant, charging him with violations of Government Code section 19572, subdivisions (c) inefficiency, (d) inexcusable neglect of duty, (e) insubordination, (m) discourteous treatment of another employee, (o) willful disobedience, and (t) other failure of good behavior either during or outside of an employee's duty hours.

**MOTION TO DISMISS RESPONDENT'S WRITTEN ARGUMENT**

Appellant made a motion to the Board to dismiss the Department's written argument on the basis that the Department's written argument was submitted after the Board's deadline. In the alternative, appellant argued that certain information set forth in the Department's written argument should be excluded from the Board's consideration. Specifically, appellant requests that references made by the Department in its brief detailing the present condition of Betty Isaac's injuries be stricken, as such references are matters of fact which are not part of the record in this case. The appellant's second request is to strike the Department's references in its written argument to the fact that patients are often working alongside food service workers and could have been present and witnessed the incident.

The Board rules as follows. The Department's written argument, though submitted a few days beyond the Board's deadline, will be considered. Initially, the Board notified both parties that written arguments were due to the Board no later than November

1, 1994. Prior to that date, both parties had an opportunity to order a copy of the record of the administrative hearing proceedings for preparation of their written arguments and both parties did order a copy of the record. The Board, however, erred in transmission of the transcript to the Department: the Department did not receive its copy of the administrative record until November 2. In fairness to the Department, the Board granted the Department additional time to prepare and submit its written argument.

According to the Board's records, however, the Department's written argument was not filed with the Board until a few days after the Board's already extended filing deadline. A party who files written arguments with the Board beyond the deadlines set by the Board always risks the possibility that the Board will consider his or her case without benefit of argument.

Courts have found, however, that even the Board's statutorily created deadlines for filing appeals of adverse actions are not jurisdictional. In Gonzalez v. SPB (1977) 76 Cal.App.3d 364, the Court of Appeal found that a failure of an employee to file a timely appeal from an adverse action with the Board did not render the appeal invalid. Where good cause is found (such as mistake, inadvertence or excusable neglect), the delay in filing is short, and no prejudice can be shown to the other party, the appeal must be accepted by the Board. (Id. at p. 367).

In the case at bar, the Department's written arguments were submitted only a few days late and only after earlier confusion regarding the Board's failure to transmit a copy of the transcript in the case to the Department. The arguments were filed in sufficient time to allow them to be processed and submitted to the Board without imposing an undue burden on hearing office staff. Since no prejudice has been shown to either the parties or the Board itself as a result of the minor delay, and given the circumstances, the motion to dismiss the Department's written argument is denied.

The Board agrees, however, that the statements contained in the last paragraph of page two of the Department's written argument concerning the extent of witness Isaac's injuries are factual statements which should not have been included in the written argument, as such factual statements were not part of the record before the Board and no motion was made to the Board to submit additional evidence. For that reason, the Board has not considered such factual assertions in arriving at the instant decision.[3]

Finally, we do not view the references in the first paragraph of page three of the Department's written argument that, at any time during the incident, patients could have been present in the room and witnessed the incident, as an assertion of facts outside

[3] The record in the evidence does establish that Isaac did sustain some degree of injury to her arm due to appellant's actions.

the record. Rather, taken in context, we view these references not as facts, but simply as argument offered by the Department to discuss the potential harm which might enure to patients should appellant's behavior recur and patients be standing nearby. Accordingly, these references are accepted only as argument and appellant's motion to exclude that particular portion of the written argument is denied.

**ISSUE**

What is the appropriate penalty under the circumstances?

**DISCUSSION**

We find a preponderance of evidence that appellant refused to comply with an order of a supervisorial employee, yelled and cursed at the same employee, hit the employee in the face, and used his physical strength to grab and push away two female coworkers who were trying to stop the confrontation. We find such actions on the part of appellant violate Government Code section 19572, subdivisions (d) inexcusable neglect of duty, (e) insubordination, (m) discourteous treatment of another employee, (o) willful disobedience and (t) other failure of good behavior.[4]

[4] There is no evidence that appellant's actions constituted a violation of subdivision (c) inefficiency. See Robert Boobar (1993) SPB Dec. No. 93-21 and Walter H. Morton Jr. (1994) SPB Dec. No. 94-26 for a discussion of what actions may constitute inefficiency.

The issue in the instant case is whether the harsh penalty of dismissal is warranted under the circumstances. As noted in the case of Skelly v. State Personnel Board (1973) 15 Cal.3d 194:

> While the administrative body has broad discretion in respect to the imposition of a penalty or discipline, it does not have absolute and unlimited power. It is bound to exercise legal discretion, which is, in the circumstances, judicial discretion. (Citations.) 15 Cal.3d at 217-218.

In exercising its judicial discretion, the Board is charged with rendering a decision which, in its judgment, is "just and proper." Government Code section 19582. One aspect of rendering a "just and proper decision" is assuring that the penalty is "just and proper."

The Skelly court set forth several factors for the Board to consider in assessing the propriety of the imposed discipline. Among the factors to be considered are the extent to which the employee's conduct resulted in, or if repeated is likely to result in harm to the public service, the circumstances surrounding the misconduct and the likelihood of its recurrence.

In this case, the harm to the public service from appellant's actions is clear. Appellant was the aggressor in a confrontation in which he yelled and cursed in Moreno's face and refused to "back off" despite Moreno's repeated request to do so. Appellant then, as he readily admits, acted out of reflex when gently touched by Moreno, hitting Moreno hard enough across the face to cause him injury.

Appellant's lack of control, however, did not end there. He proceeded to grab Isaac's arm when she innocently tried to stop appellant from fighting and then pushed away another witness who also tried to intervene. It is obvious from the facts of this situation that appellant has a violent temper which, at least on this particular occasion, was far out of control, and which resulted in some degree of physical injury to not one, but two coworkers.

As to the likelihood of recurrence, we conclude that it appears to be high. Appellant engaged in this errant behavior after less than two years in State service, and after receiving numerous informal admonitions from the Department regarding his poor behavior on the job. While none of these admonitions dealt specifically with acts of physical violence, they did put appellant on notice that the Department was not pleased with appellant's conduct and would not tolerate improper behavior.

We note that in a prior precedential decision, Frank G. Bennett (1994) SPB Dec. No. 94-01[5] this Board modified a dismissal to a 60 days' suspension after Bennett, an employee at the Department of Education, was found to have yelled and cursed at a coworker, briefly pushed the coworker against the wall, squeezed

[5] Bennett was the subject of a petition for writ of mandate filed by the Department of Education on June 17, 1994, Sacramento Superior Court, Case No. 378450. The petition was denied by the court on January 5, 1995. The Department of Education filed a Notice of Appeal on February 3, 1995.

his hands around the coworker's tie and threatened to "cut his (the coworker's) balls off and shove them down his throat." In the instant case, the ALJ recommended in his Proposed Decision that appellant's dismissal be modified after analogizing the facts of this case to the Board's decision in Bennett. While both cases involved instances of violence between co-workers, Bennett is distinguishable.[6]

While the appellant in Bennett, did yell, curse and threaten another employee, squeezing the employee's tie and making the above-stated threat, the Board found under the particular circumstances of that case, dismissal was not warranted. Most significantly, the Board noted that Bennett never struck or caused physical injury to his coworker and that even the threat he made against the coworker was one which no reasonable person would conclude Bennett was likely to act upon. Moreover, there was the important fact that Bennett had a prior clean 15 year work history, with fellow coworkers testifying that this behavior was highly out

[6] In his written argument to the Board, the appellant also argues that the penalty is too severe because he was provoked into hitting Moreno, analogizing his case to that of Raymond J. Howard (1993) SPB Dec. No. 93-07. Such an analogy also fails. In Howard, a 7 day suspension for firing a large rubber band at a worker was modified by the Board to an Official Reprimand on the grounds that Howard had been provoked by the other coworker, who had shot a rubber band at him first. Although in this case, Moreno first pushed appellant away in his chest area in a gentle manner to get appellant "out of his face", such an action was not "provocation" sufficient to mitigate appellant's actions, but rather was a legitimate action on Moreno's part when appellant refused to stop yelling and cursing into his face.

of character for him, making the likelihood of recurrence low.

In the case before us, we find no mitigating factors which justify allowing appellant a second chance. Appellant was only a two year employee with a history of counselling for inappropriate conduct. The harm to the public service is obvious. We are not convinced that this type of behavior could not recur given appellant's display of temper. Appellant's outright refusal to comply with Moreno's order, his act of striking Moreno on the face, and his subsequent actions in physically grabbing and pushing away the two women who were merely attempting to calm him down, taken altogether, justify his dismissal from State service.

As this Board first pronounced in Bennett:

> Profanity, threats and physical confrontations have absolutely no place in the work environment. Furthermore, violent physical acts by an employee against a coworker, student, client, patient or member of the public, where genuine physical harm is produced or intended, warrant dismissal. Bennett, 94-01 at p. 15.

Appellant's misconduct falls within this category and we find no mitigating factors to support modification of the penalty. Appellant's dismissal is sustained.

**ORDER**

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, and pursuant to Government Code sections 19582, it is hereby ORDERED that:

1. The adverse action of dismissal taken against Shapria F. Chapman is hereby sustained.

2. This decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

STATE PERSONNEL BOARD*

Lorrie Ward, President
Richard Carpenter, Member
Alice Stoner, Member
Alfred R. Villalobos, Member

*Vice President Floss Bos was not present when this decision was considered and therefore did not participate in this decision.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on March 7, 1995.

WALTER VAUGHN
Walter Vaughn, Acting Executive Officer
State Personnel Board